

POSTED ON WEB SITE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re
Charles W. Briggs,
Debtor.

Case No. 05-62659-B-11

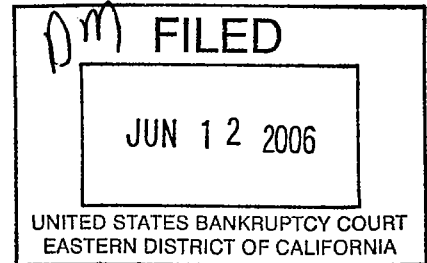
DC No. BMJ-1

Scripps Investments & Loans, Inc.,
Charles E. Scribner and Geraldine Y.
Scribner, Trustees of The Scribner
Family Trust dated 7/1/04, et al.,

Moving Parties,

v.

Charles W. Briggs,
Respondent.



**MEMORANDUM DECISION REGARDING MOTION FOR
TERMINATION OF AUTOMATIC STAY**

Albert J. Berryman, Esq., of Baker, Manock & Jensen, P.C., appeared on behalf of the movant, Scripps Investments & Loans, Inc., et al.

Michael T. Hertz, Esq., of Lang, Richert & Patch appeared on behalf of the debtor, Charles W. Briggs.

The debtor, Charles W. Briggs ("Briggs"), owns 50% of the membership interest in AB Parking Facilities, LLC, a California limited liability company (the "AB Memberships"). Scripps Investments & Loans, Inc., et al. ("Scripps Investments") moves for relief from the automatic stay to foreclose a personal property security interest it holds against the AB Memberships. For the reasons set forth below, the motion will be denied.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C. §§ 362(d)(1) and (d)(2). This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(G). This Memorandum Decision contains the court's findings of fact and conclusions of law.

175

1 **Background**

2 Briggs is an owner of AB Parking Facilities, LLC (“AB Parking”). AB
3 Parking, in turn, owns a commercial building known as the Guarantee Savings
4 Building and an adjacent parking structure (together, the “Guarantee Buildings”).
5 AB Parking is deeply in debt and the Guarantee Buildings are heavily encumbered.
6 Briggs personally guaranteed millions of dollars of debt to Scripps Investments,
7 some or all of which is secured by deeds of trust against the Guarantee Buildings.

8 The Guarantee Buildings are the subject of a non-judicial foreclosure and a
9 judicial foreclosure/receivership action being prosecuted by a secured creditor and
10 related entity, Scripps GSB I, LLC (“Scripps GSB”)¹ in the Superior Court of
11 California for the County of Fresno (the “Receivership Action”).² On June 5,
12 2006, this court granted relief from the automatic stay in the chapter 11 bankruptcy
13 of A Partners, LLC (“A Partners” - case number 06-10069) to permit Scripps GSB
14 to proceed with its non-judicial foreclosure against the Guarantee Buildings (the
15 “Scripps GSB Order”). The interrelated debt structure of A Partners and AB
16 Parking, and the likely economic consequences of Scripps GSB’s foreclosure are
17 described in more detail in this court’s Memorandum Decision filed in support of
18 the Scripps GSB Order. That Memorandum Decision is incorporated herein for
19 reference.

20 The financial difficulties of AB Parking are relevant here because if Scripps

21

22 ¹Scripps GSB and Scripps Investments appear to be closely related
23 entities. Scripps Investments is the managing entity for Scripps GSB. They are
24 both represented in this proceeding by the same law firm.

25 ²There is a dispute in the State court over whether the Receivership Action
26 is stayed by the filings of this bankruptcy, the chapter 11 bankruptcy of Mauldin-
27 Dorfmeier Construction, Inc. and the chapter 11 bankruptcy of A Partners, LLC.
28 Mauldin-Dorfmeier was the holder of the fourth priority lien against the
 Guarantee Buildings. A Partners holds the fifth priority trust deed against the
 Guarantee Buildings. A Partners was not named as a defendant in the
 Receivership Action. The question of whether the Receivership Action is
 proceeding in violation of the automatic stay has not been presented to this court
 for resolution.

1 GSB successfully completes its foreclosure against the Guarantee Buildings, that
 2 will extinguish the junior liens which secure the debt to Scripps Investments.
 3 Scripps Investments contends that the Guarantee Buildings have an appraised
 4 value of approximately \$22 million, which is far less than the total debt secured by
 5 the Guarantee Buildings. Briggs is a licensed real estate broker. He contends that
 6 AB Parking is negotiating a sale of the Guarantee Buildings to a bona fide
 7 purchaser for \$60 million to \$70 million; enough to pay the debt which Briggs
 8 guaranteed. If this court grants the motion before it, Scripps Investments, together
 9 with Scripps GSB, will essentially control AB Parking and all possibilities for
 10 liquidation or refinance of the Guarantee Buildings. Briggs states that he cannot
 11 remain in chapter 11 and pay the debt to Scripps Investments, with no apparent
 12 recourse against AB Parking for indemnity or damages.

13 Applicable Law

14 Scripps Investments moves for relief under 11 U.S.C. § 362(d),³ which
 15 provides:

16 On request of a party in interest and after notice and a hearing, the court
 17 shall grant relief from the stay provided under subsection (a) of this section,
 such as by terminating, annulling, modifying, or conditioning such stay—

18 (1) for cause, including the lack of adequate protection of an interest in
 19 property of such party in interest;

20 (2) with respect to a stay of an act against property under subsection (a)
 of this section, if—

21 (A) the debtor does not have an equity in such property; and

22 (B) such property is not necessary to an effective reorganization.

23 Pursuant to § 362(g), Scripps Investments has the burden of proof on the
 24 issue of Briggs' equity in the AB Memberships. Briggs has the burden of proof on

25
 26 ³Unless otherwise indicated, all chapter, section, and rule references are to
 27 the Bankruptcy Code, 11 U.S.C. § 101-1330, and to the Federal Rules of
 28 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after the
 effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act
 of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 all other issues. Although Briggs has the burden of proof on the issue of “cause,”
2 Scripps Investments has the initial burden to produce some evidence to establish
3 that there are some facts to support its allegation of “cause.” *Tirey Distributing*
4 *Company v. Sloan (In re Tirey Distributing Co.)*, 242 B.R. 717, 723 (Bankr. E.D.
5 Okla. 1999) (quoting *In re Tursi*, 9 B.R. 450, 453 (Bankr. E.D. Pa. 1981)).

6 **Analysis**

7 The concept of “equity” in property is based on the premise that the
8 property itself has some economic value to its owner. “Equity” is defined as “[t]he
9 amount by which the value of or an interest in property exceeds secured claims or
10 liens; the difference between the value of the property and all encumbrances upon
11 it.” BLACK’S LAW DICTIONARY 580 (8th ed. 2004).

12 Scripps Investments argues that the value of the AB Memberships should
13 be based solely upon the appraised value of AB Parking’s only significant asset,
14 the Guarantee Buildings. If that is true, and if AB Parking is as financially upside
15 down as Scripps Investments contends, then the AB Memberships have no
16 economic value to anybody, including Scripps Investments, and it is not clear why
17 Scripps Investments needs relief. Scripps Investments argues that it wants to sell
18 the AB Memberships and apply the proceeds to the obligations guaranteed by
19 Briggs. However, Scripps Investments offers no evidence to suggest that the AB
20 Memberships can be sold for enough money to significantly reduce the debt. For
21 that matter, there is no evidence that the AB Memberships can be sold in a
22 foreclosure for anything. On the face of Scripps Investments’ argument, a
23 foreclosure against the AB Memberships would be a futile and meaningless act.

24 If the AB Memberships have no economic value, then adequate protection
25 for Scripps Investments’ security interest in the AB Memberships is not an issue.
26 There is no income being generated from the AB Memberships. The AB
27 Memberships themselves are not going to be removed or lost. Scripps Investments
28 makes no showing that the value of its security interest in the AB Membership is

1 deteriorating or at risk.

2 The true equity, or “value” of the AB Memberships is not a function of the
3 book value of AB Parking’s assets. There is an intangible attribute to the AB
4 Memberships, which is potentially much more important to this case than the
5 appraised value of any buildings; that is Briggs’ ability to participate in the
6 management and control AB Parking.⁴ Scripps Investments did not discuss,
7 acknowledge, or produce any evidence relating to this issue. Scripps Investments
8 had the burden of proof on the question of the Debtor’s “equity” and it has failed
9 to persuade the court that Briggs’ ability to participate in the management of AB
10 Parking has no value to Briggs.

11 For the same reasons, the court is persuaded, at least for now, that the AB
12 Memberships are necessary to Briggs’ reorganization effort. Briggs states in his
13 declaration that AB Parking has received bona fide letters of intent to purchase the
14 Guarantee Buildings for enough to pay AB Parking’s secured debt. If Scripps
15 Investments completes its quest to own 100% of AB Parking, there is no assurance
16 that any of those potential sales will proceed in good faith to reduce or pay the
17 guaranteed debt. The only apparent hope of saving, or realizing any benefit from
18 the collateral for the debt to Scripps Investments, is in Briggs’ ability to retain
19 some element of management and control in the operations and AB Parking.

20 Finally, the court is not persuaded that cause exists to grant relief at this
21 time. The term “cause” as used in § 362(d)(1) “is a broad and flexible concept
22 which permits a bankruptcy court, as a court of equity, to respond to inherently
23 fact-sensitive situations.” *In re Indian River Estates, Inc.*, 293 B.R. 429, 433
24 (Bankr. N.D. Ohio 2003) (citing *In re Texas State Optical, Inc.*, 188 B.R. 552, 556
25

26 ⁴The other co-owner of AB Parking was at one time Ronald Allison.
27 There is currently a dispute between Allison and Scripps Investments over a prior
28 foreclosure against Allison’s 50% interest in AB Parking. Scripps Investments
contends that it now controls Allison’s interest in AB Parking. Neither party has
offered any evidence to show what control remains with Briggs.

1 (Bankr. E.D. Tex. 1995)). Factors to consider in determining whether the
2 automatic stay should be modified for cause include: (1) an interference with the
3 bankruptcy; (2) good or bad faith of the debtor; (3) injury to the debtor and other
4 creditors if the stay is modified; (4) injury to the movant if the stay is not modified;
5 and (5) the relative portionality of the harms from modifying or continuing the
6 stay. *In re Tirey Distributing Co.*, 242 B.R. at 723 (citing *Milne v. Johnson (In re*
7 *Milne)*, 185 B.R.. 280 283 (D.C. N.D. Ill. 1995)).

8 Applying the “cause” factors to this case, the court notes first that there is
9 no allegation or evidence to suggest any bad faith by Briggs. Briggs will not be
10 able to reorganize in chapter 11 if he cannot participate in AB Parking’s effort to
11 sell or refinance the Guarantee Buildings to pay the debts which Briggs
12 guaranteed. Scripps Investments makes no showing that it will suffer any injury if
13 it cannot foreclose on the AB Memberships. There is no need to physically protect
14 the assets of AB Parking; the Guarantee Buildings are already being protected in
15 the Receivership Action. The AB Memberships were pledged to Scripps
16 Investments as collateral for a personal guarantee, not the underlying obligation.
17 The amount of any deficiency to Scripps Investments will not be known until, *inter*
18 *alia*, the fate of the Guarantee Buildings becomes more clear. A sale of the AB
19 Memberships will not significantly reduce the debt to Scripps Investments. Unless
20 Scripps Investments is willing to release Briggs from any personal liability on his
21 guarantees, the court cannot find that it is fair and equitable to give Scripps
22 Investments, and its related entity, Scripps GSB, total control over AB Parking, the
23 only entity with the ability to liquidate the only asset that stands between Briggs
24 and a chapter 7.


25 ///

26 ///

27 ///

28 ///

Based on the foregoing, the court is not persuaded that cause exists to grant relief from the automatic stay at this time. Further, the court is not persuaded that Scripps Investments lacks adequate protection for its security interest in the AB Memberships, that the AB Memberships have no economic value to Briggs' bankruptcy estate, and that they are not necessary to Briggs' reorganization effort. The motion for termination of automatic stay will be denied.


W. Richard Lee
United States Bankruptcy Judge